

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel.)
MARY HENDOW and JULIA ALBERTSON)
Plaintiffs,) 2:03-cv-0457-GEB-DAD
v.) ORDER*
UNIVERSITY OF PHOENIX,)
Defendant.)
_____)

Defendant moves for an order disqualifying Plaintiffs' lawyers based on the contention that Plaintiffs' lawyers had unethical ex parte communications with some of Defendant's employees. Defendant also seeks an order excluding evidence Plaintiffs' lawyers obtained during the referenced communications. Plaintiffs oppose the motion.

DISCUSSION

Eastern District of California Local Rule 83-180(e) prescribes in pertinent part that "the Rules of Professional Conduct of the State Bar of California and decisions of any Court applicable thereto . . ." govern the "standards of professional conduct in this

* This matter was determined to be suitable for decision without oral argument. E.D. Cal. R. 78-230(h).

1 Court." E.D. Cal. 83-180(e). Rule 2-100(B)(2) of the Rules of
 2 Professional Conduct of the State Bar of California prohibits ex parte
 3 communications with a represented party who is "an employee of [a]
 4 corporation . . . if the *subject of the communication is any act or*
 5 *omission of [the employee]* in connection with the matter which may be
 6 binding upon or imputed to the organization for purposes of civil or
 7 criminal liability" (emphasis added). However,

8 [R]ule 2-100 does not bar contact with all
 9 corporate employees. For example, it is possible
 10 in any given case that a corporate officer or
 11 director covered by rule 2-100 may not be privy to
 12 information protected by the attorney-client
 13 privilege, while a lower level employee who is not
 14 shielded from contact under rule 2-100 may be in
 15 possession of substantial privileged information.
 16 However, this does not enable corporate counsel to
 17 automatically assert the privilege as to every
 18 corporate employee and on that basis enjoin
 19 opposing counsel from any and all contact with
 20 employees not covered by rule 2-100.

21 La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court

22 121 Cal.App.4th 773, 787 (Cal. Ct. App. 2004) citing Triple A Machine
 23 Shop, Inc. v. State of California, 213 Cal.App.3d 131, 143 (Cal. Ct.
 24 App. 1989) (emphasis added).

25 Defendant's opening brief lists 16 lower level employees
 26 with whom Defendant argues Plaintiffs' counsel communicated in
 27 violation of Rule 2-100(B)(2). Defendant only discusses five of the
 28 16 listed employees in this brief: Steve Brodale, Thomas Corbett,
 Charlotte Gould, Nicolas Huff, and David King. (Def's Mot. 5-7, 9,
 11-12.) Defendant's evidence concerning Plaintiffs' counsel's alleged
 improper communication with Nicolas Huff and David King simply
 consists of Defendant's summary of Plaintiffs' discovery privilege
 log, in which Plaintiffs lists the dates when the alleged

1 communications took place. This summary is insufficient to show a
2 violation of Rule 2-100(B)(2).

3 Defendant also argues Plaintiffs' lawyers violated Rule
4 2-100(B)(2) when they had ex parte communications with Charlotte Gould
5 ("Gould"). Defendant relies on its summarized version of Plaintiffs'
6 discovery privilege log as support for this argument, Gould's
7 deposition testimony given on December 9, 2008, and a declaration from
8 Matthew Mitchell, Vice President of Human Resources Legal Services for
9 the Apollo Group, Inc. (Defendant's parent company). The following
10 Gould deposition testimony is at issue: "there was one memo that I had
11 read through that I had sent to [Plaintiffs' counsel] Nancy Krop in
12 December of '04, I believe it was, just to refresh my memory. It's
13 been several years since I worked at the San Jose campus." (Dep. of
14 Charlotte Gould 16:18-22.) Gould further testified that the memo to
15 Nancy Krop "outlin[ed] the events of my employment . . . when I was in
16 the San Jose campus." (Dep. of Gould 17:2-3.)

17 Plaintiffs counter with Gould's subsequent declaration in
18 which Gould declares that when she was deposed on December 9, 2008,
19 she "did not have [her] records" and that the attorney who in fact
20 contacted her in 2004 was an attorney for the Defendant, not
21 Plaintiffs' counsel. (Decl. of Gould ¶¶ 5-7.) Gould declares that
22 her "first contact with Ms. Krop was in July 2005." (Decl. of Gould ¶
23 6.)

24 Defendant argues in its reply brief that "[g]iven the timing
25 and circumstances surrounding Ms. Gould's declaration, and Relators'
26 counsel's interest in having Ms. Gould change her testimony, Ms.
27 Gould's declaration is simply not credible and this Court should
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1 disregard it." (Def.'s Reply 13:17-20) This record, however, does not
2 show a violation of Rule 2-100(B)(2).

3 Defendant also argues it has "reason to believe" Steve
4 Brodale ("Brodale") was contacted by Plaintiffs' counsel in violation
5 of Rule 2-100(B)(2), and that Plaintiffs' counsel said they would not
6 call this witness at trial "if the University would refrain from
7 further pursuing the issue of [the] improper contacts." (Def's Mot.
8 8:28-9:3; Ex. K to Def's Mot., Letter from Robert Nelson, March 11,
9 2009.) Defendant indicates that Plaintiffs' counsel's offer not to
10 call Brodale at trial reveals Plaintiffs' counsel concedes they had
11 unethical communications with Brodale. Further, Defendant submits a
12 letter from Robert Nelson, one of Plaintiffs' lawyers, in which Robert
13 Nelson states the subject of the communication with Brodale concerned
14 Brodale's attempt to have Plaintiffs' counsel represent him. (Decl.
15 of Robert Nelson in support of Pl.'s Opp'n ¶ 3; Ex. A to Pl.'s Opp'n.)
16 Defendant's opening brief does not provide any evidence contradicting
17 Plaintiffs' position that this was the extent of the communication
18 between Plaintiffs' counsel and Brodale. Thus, again, Defendant
19 fails to show a violation of Rule 2-100(B)(2).

20 Lastly, Defendant argues Plaintiffs' counsel violated the ex
21 parte rule by communicating with Thomas Corbett ("Corbett").
22 Plaintiffs and Defendant both rely on Corbett's deposition testimony,
23 in which Corbett testified he communicated with Plaintiffs' counsel
24 while on "leave status" and that the subject matter of this contact
25 concerned Plaintiffs' counsel's instruction to Corbett that Corbett
26 contact Plaintiffs' counsel after Corbett officially ceased being
27 employed by Defendant. (Dep. of Corbett at 33:25-34:23.) Plaintiffs
28 also provide a declaration from Nancy Krop, one of their attorneys, in

1 which she declares that "substantive discussions [concerning UOP's
2 practice of unlawfully paying commissions, bonuses, and other
3 incentive payments to enrollment counselors based upon the number of
4 students . . . enrolled] did not occur [with Corbett] until after Mr.
5 Corbett had become a former employee." (Decl. of Nancy G. Krop in
6 support of Pl.'s Opp'n ¶ 14.) Defendant also argues in its reply that
7 Plaintiffs "revised" their privilege log to show Nancy Krop "as the
8 sender of all communications to Mr. Corbett" and "to add two letters
9 involving Mr. Corbett," which "pre-date the e-mails on the earlier
10 version of the privilege log," and which show that one letter was sent
11 "from Mr. Corbett to Ms. Krop." (Def.'s Reply 15: 1-8.) This evidence
12 does not show a violation of Rule 2-100(B)(2).

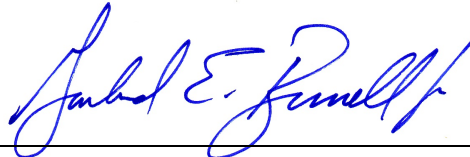
13 Defendant filed a lengthy reply brief to Plaintiffs'
14 opposition brief which contained new authority and more facts
15 concerning Plaintiffs' counsel's alleged ex parte communications.
16 However, "[i]t is improper for a moving party to introduce new facts .
17 . . in the reply brief than those presented in the moving papers" when
18 those facts could have been presented in the opening brief. Jones v.
19 Baltimore Life Ins. Co., No. Civ. S-06-1501 LKK/KJM, 2007 WL 1713250,
20 at *9 (E.D. Cal. June 12, 2007). "It cannot seriously be disputed
21 that a movant is obligated to file with a motion the evidentiary
22 materials necessary to justify the relief it seeks." Spring
23 Industries, Inc. v. American Motorists Ins. Co., 137 F.R.D. 238, 239
24 (N.D. Tex. 1991). The reply brief is not intended to be the brief
25 that shows for the first time the movant's evidentiary support for the
26 relief sought in the movant's opening brief. Where a movant injects
27 evidence in a reply brief that should have been included in the
28 opening brief, the movant could fail to "affor[d] the nonmovant an

1 opportunity for further response." Id. at 240; c.f. Carmen v. San
2 Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001)
3 (discussing in a different context the situation where a party could
4 deny another party "a fair opportunity to address the matter in [a
5 brief]," and indicating that when a party receives notice and an
6 opportunity to be heard on the critical evidence, it might sometimes
7 show the inadequacy of the evidence, and that a party should not
8 engage in conduct tantamount to forcing "the court [to] hol[d] oral
9 argument" so that another party has an opportunity to address new
10 evidence.) Under such circumstances, the court has discretion to
11 "decline to consider" the new evidence. Spring Industries, Inc., 137
12 F.R.D. at 240. Since Defendant's opening brief failed to provide
13 Plaintiffs with a fair opportunity to address the factual information
14 contained in Defendant's reply brief, that evidence is not considered.

15 CONCLUSION

16 Therefore, Defendant's motion to disqualify Plaintiffs'
17 counsel and to exclude the evidence and witness testimony is denied.

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19 Dated: August 24, 2009

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22 GARLAND E. BURRELL, JR.
23 United States District Judge
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